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Attorney General of the United States,

_____

Assistant Attorney General of the United States,

_____

General Counsel of the Bureau of Internal Revenue,

Attorneys for Respondent.

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In the Supreme Court OF THE United States

OCTOBER TERM, 1932

No. 31

J. H. GWINN, Beneficiary of the Estate of M. A. Gwinn, Deceased,
Petitioner,

vs.

DAVID BURNETT, Commissioner of Internal Revenue,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONER.

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No. 31

J. H. GWINN, Beneficiary of the Estate of M. A. Gwinn, Deceased,
Petitioner,

vs.

DAVID BURNETT, Commissioner of Internal Revenue,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONER.

This is a proceeding to review an opinion of the United States Circuit Court of Appeals for the Ninth Circuit. The opinion of the Circuit Court of Appeals (Tr. 32) reported in 54 Fed. (2d) 728, affirms an order of the Board of Tax Appeals denying petitioner relief from a proposed additional assessment.

JURISDICTION.

The petition filed with the Board of Tax Appeals was heard at San Francisco on May 21, 1930. (Tr. 1.) The decision of the Board of Tax Appeals was promulgated and entered on September 30, 1930 (Tr. 10) and may be found in 20 B. T. A. 1052. Order filed March 28, 1931. (Tr. 19.) The case was brought before the Ninth Circuit Court of Appeals by petition for review filed March 28, 1931 (Tr. 19-24), pursuant to Sections 1001-1003 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 109-110. The judgment of the Circuit Court of Appeals was filed and entered January 5, 1932. (Tr. 40.) A petition for rehearing was denied on February 23, 1932. (Tr. 41.) The petition for a writ of certiorari was filed March 29, 1932, and was granted on May 16, 1932. (Tr. 45.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. (Ch. 229, 43 Stat. 936.)

QUESTION PRESENTED.

Whether to compute the Federal estate tax of decedent, a resident of the State of California, who died October 5, 1924, (which tax was consequently governed by Section 302 of the Revenue Act of 1924) the Commissioner should include in the gross estate one-half of the value of certain property located in the State of California which was held by decedent and her son, the petitioner, under a joint tenancy with right of survivorship created in June, 1915.

STATUTES AND REGULATIONS INVOLVED.

The statutes and regulations involved are set forth in the appendix.

SPECIAL NOTE.

The attention of the Court is called to the fact that the words "held subject to the tax" appearing in 54 Fed. (2d) 728 at 730, last paragraph, do not appear in the opinion of the Circuit Court, Transcript of Record, page 39. The clerk of the Circuit Court states that Judge James must have made this insertion in the opinion sent to the West Publishing Co. According to the opinion in the Federal Reporter the interest of decedent is taxed on two grounds.

A STATEMENT OF THE ESSENTIAL FACTS.

The Board of Tax Appeals found the facts as stipulated by the parties. They may be summarized as follows:

The petitioner is the beneficiary of the estate of M. A. Gwinn, deceased, and is in actual or constructive possession of the property of the decedent. Decedent died on October 5, 1924, and at the time of her death was a resident of Petaluma, State of California. (Tr. 11.)

In June, 1915, the decedent and her son, the petitioner, while residing in California acquired certain property as joint tenants, with right of survivorship

and not as tenants in common and the decedent and her son contributed equal amounts of property to the said estate in joint tenancy so created by them in 1915. (Tr. 12.)

In computing the value of the gross estate of the decedent, the respondent determined the value of all of the property held in joint tenancy by the decedent and the petitioner and then included in the gross estate of the decedent as subject to the Federal estate tax, half of the value of the property so held by the two as joint tenants, aforesaid, allowing certain deductions and computing the tax on the net estate so determined in accordance with the rates prevailing in the applicable acts, no effort being made to include anything other than the decedent's half of the total estate held in joint tenancy. (Tr. 11-12.)

It is agreed between the parties that if the Commissioner was not justified in including half of the value of the property so held as joint tenants, there has been an overpayment of estate tax in the amount of $2,172.16, and that if half of the value of the property held as joint tenants is properly subject to the estate tax, there is a deficiency in the amount of $719.61. (Tr. 12.)

Upon these facts the Board of Tax Appeals held that half of the value of the property held in joint tenancy by the decedent and the petitioner (her son) must be included in the decedent's gross estate for Federal estate tax purposes, and entered its order that there is a deficiency in Federal estate tax in the sum of $719.61. The Circuit Court of Appeals for

the Ninth Circuit affirmed the decision of the Board of Tax Appeals.

SUMMARY OF ARGUMENT.

A1. This joint tenancy was created, transferred and vested in survivor in June, 1915. At the time of the transfer there was no law of the State of California imposing any transfer or inheritance tax upon the right accruing to a surviving joint tenant upon the death of his cotenant, neither was there a law of the United States imposing a transfer tax on the creation of joint ownerships nor the rights passing at death. In 1915 the legislature of California, only for the purpose of imposing an inheritance tax, changed the common law rule by deeming that the rights accruing to a surviving joint tenant upon the death of his cotenant accrued by reason of death and not by reason of the transfer, which created the joint tenancy. The Supreme Court of California held that the question of liability to inheritance taxes must be determined by the law in force at the time title vests in virtue of the transfer.

A2. The laws of California are controlling in a Federal Court on all questions regarding the right, title and interests of joint tenants in property, therefore, in order to determine whether the interest of decedent vested in survivor before Congress changed the common law rule on September 8, 1916, the decision of the Supreme Court of California on that question should be binding on this Court.

B. Joint tenancies or tenancies by the entirety did not transmit, transfer or pass at death any interest in property, they, therefore, would not be subject to an estate or transfer tax. Congress in enacting the Estate Tax Act of 1916 found it necessary in order to prevent tax evasion, to specifically include the value of the interest of a decedent in a joint tenancy or tenancy by the entirety under Section 202 (e). Provisions similar to Section 202 (e) were enacted in all subsequent acts. Section 302 (e) is the provision in the 1924 Act.

On September 8, 1916, Congress changed the common law rule for tax purposes only. In all joint ownerships with right of survivorship created after September 8, 1916, the interest of the decedent accrued to the survivor not by reason of the transfer, but by reason of death. The law declared or deemed a taxable transfer, when in fact there was no legal one.

C. The joint tenancy here in question was not created to evade or avoid taxes, being created in June, 1915.

D1. The interest decedent held immediately prior to her death was extinguished by that event. As no interest could be transferred, or terminated at death, no interest ceased or existed at death. Death did not transfer any interest in property to her cotenant. The deed definitely fixed the title thereto.

D2. The right of possession and enjoyment of the whole passed to petitioner at the time of the creation of the joint tenancy. In the three cases, upon which

respondent relies, "possession and enjoyment" of the property passed to the beneficiaries at or after death. These cases have no application here.

D3. A transfer made subject to a power of revocation in the transferor, terminable at death and to take effect at or after death, must be distinguished from a transfer made subject to a power of revocation in the transferor which must be exercised during lifetime and cannot be exercised at death or to take effect at or after death.

In the former case, the power ceases at death. In the latter, there is no power at death, it ceased immediately prior thereto.

E1. This Court by implication has already construed the word "before" in Section 302 (h) Act of 1924 to mean before June 2, 1924, to September 8, 1916. Respondent construes it to mean regardless of when created.

E2. The tax imposed was invalid and the present tax is invalid. It is not an excise or transfer tax, but is a tax on property. There was no transfer at death, neither was this estate included in the class of estates wherein a transfer was deemed to take place at death by a special provision, in order to prevent tax evasion by the creation of such tenancies subsequent to September 8, 1916.

The statute as construed by respondent is therefore arbitrarily retroactive and it offends the Fifth Amendment. The tax imposed (and the present tax),

being a tax on property and a direct tax, must be apportioned as the Constitution directs.

SPECIFICATIONS OF ERROR.

The Circuit Court of Appeals for the Ninth Circuit erred in the following particulars:

(a) The Court erred in failing to hold that a joint tenancy, created in June, 1915, prior to the first taxing statute, gave to each tenant a present joint ownership in the whole property, that there was no change in title and no transfer by reason of the death of decedent; that the estate had completely vested prior to the date of the law.

(b) The Court erred in holding that the right accruing to a surviving joint tenant upon the death of his cotenant in a joint tenancy created prior to the first State and Federal taxing statute, accrued by reason of the death of the cotenant and not by reason of the transfer theretofore made which created the joint tenancy.

(c) The Court erred in failing to hold that a joint tenancy created before September 8, 1916, was not created for the purpose of evading Federal estate taxes.

(d) The Court erred in failing to hold that no interest ceased by reason of death or passed to her son.

(e) The Court erred in failing to hold that here there has been taxed and now a further attempt to

tax, an interest in property created, transferred, and vested in survivor prior to the first taxing statute and, therefore, the tax is arbitrary and capricious and violates the due process clause of the Fifth Amendment.

ARGUMENT.

A.

1. BOTH AT COMMON LAW AND UNDER THE CIVIL CODE OF CALIFORNIA THE LEGAL EFFECT OF A JOINT TENANCY IS THAT THE TITLE TO THE JOINT PROPERTY DOES NOT PASS TO AND VEST IN THE SURVIVOR, UPON THE DEATH OF HIS COTENANT, BUT THAT EACH IS SEIZED OF THE WHOLE ESTATE FROM THE FIRST, AND NO CHANGE OCCURS IN HIS TITLE ON THE DEATH OF HIS COTENANT.

The highest Court of the State of California had before it in the *Estate of Gurnsey,* 177 Calif. 211, the question whether property held in joint tenancy is subject to the payment of an inheritance tax. The joint tenancy in question was created on April 11, 1911. Gurnsey died on February 9, 1915. The inheritance tax statutes enacted prior to the year 1915 did not specifically subject to a tax the interest of a decedent in a joint tenancy or the right accruing to a surviving joint tenant upon the death of his cotenant.

In May of 1915 the legislature of the State of California amended the inheritance tax law by inserting an entirely new provision with respect to the taxation of joint tenancies. This amendment was effective

August 10, 1915, 90 days after its approval, and read as follows:

Act 4035B Section 1, Subdivision G:

> "When any person or persons, either directly or indirectly create any joint tenancy, joint account, joint deposit, or other interest in any property, whereby any right of survivorship is created between such person or persons and any other person or persons, without valuable and adequate consideration therefor, the creation of such joint tenancy, joint account, joint deposit or other interest in such property, with right of survivorship, shall be deemed to be a transfer intended to take effect in possession or enjoyment at or after the death of the person or persons in this paragraph first mentioned, within the meaning of this act." (Amendment approved May 10, 1915. Statute 1915, page 435.) (Repealed 1917.)

In determining whether the joint tenancy in the *Gurnsey* case, supra, was subject to an inheritance tax under the statute the Court said:

> "The argument of the controller is that the creation of a joint deposit by a husband and wife out of money which was previously community property, is in legal effect a transfer of property to vest in the other upon the death of either; that the intent of the husband in the creation of this deposit is conclusively presumed to have been to transfer the property to his wife, to take effect in possession and enjoyment by her, at his death.

"This question was under consideration by this court in *McDougald v. Boyd,* 172 Cal. 753 (159 Pac. 168), where a joint account was created by a husband and wife in a manner substantially the same as here. The court said: 'Mrs. Boyd did not take any interest in the deposits as heir of or successor to her deceased husband. She took by virtue of her estate originating at the time of the creation of the joint tenancies. The imposition of the tax cannot, therefore, be sustained upon theory that the deposits formed a part of the estate of Colin M. Boyd, passing upon his death to his wife. Boyd died on March 13, 1912. The inheritance tax statute then in force was the act approved April 7, 1911 (Stats. 1911, p. 713), and this act did not undertake to impose a tax on the right accruing to a surviving joint tenant upon the death of his co-tenant.' The act of 1911, so far as that subject is concerned is similar to the act of 1905, upon which the present case depends. The joint tenancy referred to in the Civil Code (sec. 683), and here involved, is the estate known as such at common law. In Kennedy v. McMurray, 169 Cal. 287, (Ann. Cas. 1916D, 515, 146 Pac. 647) we held that a joint deposit account made in the same manner as the account here involved, created a joint tenancy, and that such deposit was no part of the estate of the party who first died. In Estate of Harris, 169 Cal. 725, (147 Pac. 967), the court decided that a joint tenancy in personal property could be created by parol, and that 'upon the death of one of two joint tenants, the survivor thereupon becomes the sole owner of the entirety, not by descent, but by survivorship

and in virtue of the original grant creating the tenancy.' In Hannon v. Southern Pac. R. Co., 12 Cal. App. 350, 355, (107 Pac. 335), the subject was treated at greater length. It was there shown that, at common law, the title to the joint property did not pass to and 'vest in the survivor' upon the death of his cotenant, but that 'each tenant was seised of the whole estate from the first, and no change occurred in his title on the death of his cotenant'; that 'it simply "remained" to him,' and came to him 'wholly from the original grant,' so that after the death of one, the other, in pleading his title, could allege a conveyance by the original grantor to himself, without mention of the cotenant, citing Coke on Littleton, Section 286, and 1 Washburn on Real Property, page 646, and concluding with the following: 'It is therefore a mistake to say of joint tenants that the title vests in the survivor upon the death of the cotenant; or that it descends to him from his cotenant; for it had already vested in him by, and at the time of, the original grant.' This is the legal effect of a joint tenancy at common law and under our code, and it would, of course, prevail without regard to the actual intent of the donor who created it. The inheritance tax law, prior to 1915, imposed such tax upon transfers by gift, 'Intended to take effect in possession and enjoyment' by the donee, only at or after the death of the donor. A transfer to joint tenants, without other conditions, does not come within that description, for, as above shown, it gives to the donee immediately the title and the right of possession and enjoyment of the whole, and he succeeds to no new title or right upon

the death of his cotenant, but is merely relieved thereby from the further interference of the cotenant. The legislature of 1915 was evidently of the same opinion. The act of 1915 declares that deposits to joint account of the donor and donee, in joint tenancy, 'shall be deemed to be a transfer intended to take effect in possession or enjoyment at or after the death' of the donor. (Stats. 1915, p. 436.) The statement in McDougald v. Boyd, 172 Cal. 753, (159 Pac. 168), that the act of 1911 did not undertake to impose such tax upon the 'right accruing to a surviving joint tenant upon the death of his cotenant,' is, in our opinion, correct. Some restriction upon the possession and enjoyment of the donee, other than that arising from the law of joint tenancy was necessary, under the previous acts, to bring the transfer within its definition."

* * * * * * *

"Upon the death of either the property remained, and all of it remained, the property of the survivor, as it was, in contemplation of law, from the time of its creation." Estate of Gurnsey, 177 Cal. 211 at 217."

* * * * * * *

"The rule on the subject is that the question of liability to inheritance taxes must be determined by the law in force at the time the title vests in virtue of the transfer. (Hunt v. Wicht, 174 Cal. 205, (L. R. A. 1917C, 961, 162 Pac. 639).") Estate of Gurnsey, 177 Cal. 211-214.

The case of *Atty. Gen. v. Clark*, 222 Mass. 291, 110 N. E. 299, as to the facts are almost identical with the *Gwinn* case with the exception of the dates. The

opinion in its conclusions of law is similar to the decision of *Estate of Gurnsey,* supra:

> "Joint tenancy arises under the common law, and the doctrine of survivorship thereunder grows out of the application of common law principles wholly independent of statutes. Joint tenants hold under the conveyance or instrument by which the tenancy is created" * * *
>
> * * * * * * *
>
> "Mary M. Clark and her sister, Elizabeth, as joint tenants held under a tenure which would give the survivor the whole if there was no alienation thereof by either party. Upon the death of Elizabeth, Mary as her survivor, took the whole estate, not by descent as the heir at law of her sister or under the laws regulating intestate succession, but as the sole surviving joint tenant. In accordance with the stipulation of the parties, let the entry be: Information dismissed with costs."

The law of California is thereby settled:

(a) With respect to a joint tenancy created prior to the first statute imposing a tax, the title vests in the survivor by virtue of the original grant; possession or enjoyment of the whole passes at the time of the creation of the joint tenancy; and all of the property remains the property of the survivor, as it was, in contemplation of law, from the time of its creation. The statute is not retroactive. Such a joint tenancy is not subject to a tax.

(b) With respect to a joint tenancy created subsequent to August 10, 1915, the rule is different. Only for the purpose of levying an inheritance tax is the

common law rule changed. The creation of a joint tenancy subsequent to August 10, 1915, shall be deemed to be a transfer intended to take effect in possession or enjoyment, not at the time of its creation, but at or after the death of the person or persons first mentioned, within the meaning of the Act. The right accruing to the surviving joint tenant upon the death of his cotenant is made the subject of a tax by this specific legislation.

The estate of M. A. Gwinn, deceased, was not subject to an inheritance tax, as the joint tenancy was created prior to August 10, 1915, the effective date of the first statute imposing a tax on joint tenancies.

---

2. PROPERTY IN CALIFORNIA HELD BY A DECEDENT AND HER SON IN JOINT TENANCY SINCE BEFORE THE FIRST ESTATE TAX LAW IS NOT TO BE INCLUDED IN DECEDENT'S GROSS ESTATE.

When Congress enacted the Revenue Act of 1916 (39 Stat. L. 777), Section 201 imposed a tax upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States. It was apparent that Section 201 did not include joint tenancies or tenancies by the entirety for the reason that no transfer takes place at death in a joint tenancy or tenancy by the entirety according to the common law rule. There being no transfer, no tax could be imposed, as the tax was imposed on the transfer. So it was, therefore, necessary to enact Section 202 (c) and to

specifically include under this section the taxation of the interest of a decedent in a joint tenancy or a tenancy by the entirety, and bring it within the reach of the words imposing the tax.

Tyler v. United States, 281 U. S. 497-502:

> "Section 201 imposes the tax 'upon the transfer of the net estate'; and if that section stood alone, the inclusion of such property in the gross estate of the decedent probably could not be justified by the terms of the statute. But section 202 definitely includes the property and brings it within the reach of the words imposing the tax; so that a basis for the constitutional challenge is present."

What did Congress do when it enacted Section 202 (C) of the Revenue Act of 1916? It changed the common law rule only for the purpose of levying an estate tax upon the value of the interest of a decedent in a joint tenancy or tenancy by the entirety. The interest of the surviving joint tenant or tenant by the entirety was declared or deemed by Congress to accrue not by reason of the transfer, theretofore made which created the joint ownership, but to accrue by reason of the death of the cotenant. The right of possession and enjoyment of the whole was declared or deemed by Congress not to take effect at the time of the creation of the joint ownership, but to take effect at or after the death of decedent. The property rights accruing to surviving joint tenant upon the death of his cotenant was declared or deemed

by Congress to be the proper subject of an estate tax to be measured in whole or part by the value of such rights.

The Legislature of the State of California in August of 1915, subjected to an inheritance tax the right accruing to a surviving joint tenant upon the death or his cotenant by declaring that the creation of a joint tenancy shall be deemed to be a transfer intended to take effect in possession or enjoyment at or after the death of the donor.

Congress in September of 1916 accomplished the same objective in a different manner. It subjected to an estate tax the property rights accruing to a surviving joint tenant upon the death of his cotenant, to be measured in whole or in part by the value of such rights, by declaring that the gross estate of a decedent shall include the value of, to the extent of the interest therein, property held jointly or as tenants by the entirety, and a tax is imposed upon a transfer of such rights.

Although not expressly stated, the Act of 1916, declared or deemed that a transfer of property rights to the surviving joint tenant, accrued by reason of death and not by reason of the transfer, which created the joint tenancy. The several reasons the Supreme Court of California stated in *Estate of Gurnsey,* supra, with respect to the taxation of the interest of a decedent in a joint tenancy created prior to August 10, 1915, apply here with equal force to a

joint tenancy created prior to the first federal taxing statute of September 8, 1916.

The interest of decedents in joint tenancies created prior to September 8, 1916, under the laws of California were held not subject to estate tax under the 1916 Act and the 1918 Act due to the fact that the estate vested in survivor prior to September 8, 1916. (*Carter v. English,* 15 F. (2d) 6 (C. C. A. 9); *Doe Estate v. Commissioner,* 18 B. T. A. 427; *Doe Estate,* appeal dismissed C. C. A. 9, 48 F. (2d) 1071; *Mastick Estate v. Commissioner,* 18 B. T. A. 428; *Mastick Estate,* appeal dismissed, C. C. A. 9, 48 F. (2d) 1071.)

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3. AS ALL PARTIES TO THE INSTRUMENTS CREATING THE JOINT TENANCY RESIDED IN THE STATE OF CALIFORNIA, AND THE INSTRUMENTS WERE DELIVERED THERE AND THE PROPERTY TRANSFERRED WAS THERE, THE LAW OF THAT STATE IS CONTROLLING ON ALL QUESTIONS INVOLVING THE RIGHT, TITLE AND INTEREST THEREIN.

The right to dispose of property by will, as well as the right to own and grant it is within the control of the states and not of the nation, therefore, in order to determine the time of the vesting of the interest in a joint tenancy and the respective rights of the parties therein, we must look to the laws of the State of California, wherein the principle is well settled that all right, title and interest in the joint estate vests at the time of the creation of the tenancy.

Personal property may be held by two or more persons in joint tenancy. There is no distinction in this respect between real and personal property.

Dennigan v. San Francisco Savings Union, 127 Cal. 142, 59 Pac. 390;

Kennedy v. McMurray, 169 Cal. 287, 146 Pac. 647.

"Joint interest, what. A joint interest is one owned by several persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants." Section 683, *Civil Code of California.*

One of the incidents of a joint tenancy is that, upon the death of one of the two joint tenants, the survivor thereupon becomes the sole owner of the entirety, not by descent, but by survivorship, and in virtue of the original grants creating the tenancy.

DeWitt v. San Francisco, 2 Cal. 297;

Green v. Blanchard, 40 Cal. 197;

Kennedy v. McMurray, 169 Cal. 287;

Estate of Harris, 169 Cal. 725;

Estate of Gurnsey, 177 Cal. 211;

Hannon v. Southern Pacific R. Co., 12 Cal. App. 356, 107 Pac. 335;

Carter v. English, 15 F. (2d) 6;

Green v. Skinner, 185 Cal. 435.

The petitioner contends that these laws and decisions of the State of California which define and determine from the earliest days down to the time of

the death of M. A. Gwinn, the nature of an estate in joint tenancy and the legal consequences flowing therefrom constitute a rule of real and personal property in the State of California which is binding upon the Federal Courts if the joint tenancy was created prior to September 8, 1916. The Board of Tax Appeals in its decision concludes that in law, the cases, (including the instant case) the joint tenancies involved were created and the title of the decedents whose estates were sought to be taxed were vested prior to the enactment of the applicable act. (Tr. 15.)

Federal Courts are bound by a state rule of property:

> *Jackson v. Chew,* 12 Wheat. 153, 167, 169;
> *Suydam v. Williamson,* 24 How. 427, 433, 434;
> *DeVaughn v. Hutchinson,* 165 U. S. 566, 570;
> *Clarke v. Clarke,* 178 U. S. 186, 191;
> *Warburton v. White,* 176 U. S. 484, 496;
> *United States v. Title Insurance & Trust Co.,* 265 U. S. 472, 486.

In *Talcott v. United States,* 23 F. (2d) 897 (C. C. A. 9), the Court said:

> "We see no escape from the conclusion that the interest of the surviving wife, as it is finally determined by the Supreme Court of California, is of a nature that renders it subject to taxation under the plain terms of the Federal Revenue Act."

In June, 1915, at the time of the creation and vesting of this joint tenancy, it gave to the donee imme-

diately the title and the right of possession and enjoyment of the whole and he succeeds to no new title or right upon the death of his cotenant, but is merely relieved from the further interference of the cotenant. At the time of the transfer there was no law of California nor of the United States imposing a tax upon the rights accruing to a surviving joint tenant upon the death of his cotenant, and this transfer was intended to take effect in possession and enjoyment of the whole in June of 1915.

In the instant case the interest of decedent vested in the survivor prior to August 10, 1915, and according to the decision of the California Supreme Court, *Estate of Gurnsey,* supra, this interest is vested. We submit, that the inclusion of the value of decedent's interest in the gross estate by respondent under the provisions of subdivisions (e) and (h) of Section 302, Revenue Act of 1924 (43 Stat. 303), and the taxation of same under Section 301 of the same act is, therefore arbitrary and so capricious as to offend the due process clause of the Fifth Amendment.

> *Levy v. Wardell,* 258 U. S. 542, 42 S. Ct. 395:
>
> "At the time of the transfers there was no law of the State of California imposing any transfer or inheritance tax, nor was there a law of the United States to that effect, and all of the transfers were intended to take effect in possession and enjoyment upon their date. The act of Congress, therefore, should not be construed to be retroactive, and, if so construed, was in viola-

tion of the Constitution of the United States, in that it would take property of plaintiff's without due process of law, in violation of the Fifth Amendment, and would not be, besides, a transfer tax or an indirect tax, but would be a direct tax thereon, in violation of article 17, Section 9, subdivision 4, of the Constitution of the United States, because not laid in proper relation to census or enumeration is therein provided."

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4. THE NEW YORK DOCTRINE OF TREATING JOINT TENANCIES AS TENANCIES IN COMMON FOR TAXATION PURPOSES IS NOT APPLICABLE TO A CALIFORNIA JOINT TENANCY.

Respondent in his brief in opposition to the petition for a writ of certiorari in the instant case states (p. 10): "It is plain that there is nothing in *Knox v. McElligot* which is inconsistent with the respondent's position in the instant case." The Board of Tax Appeals in its opinion cites and relies upon the case of *Knox et al. v. McElligot,* 258 U. S. 546. (Tr. 18.)

The case of *Knox v. McElligot,* supra, did not decide the question raised in this case and decided only the question plaintiff in error raised: that the respondent erroneously assessed and collected a tax on one-half of the joint estate that vested in Cornelia B. Kissam prior to September 8, 1916. *Furthermore, Knox v. McElligot, supra, involved only a question of construction,* and *Shwab v. Doyle,* 258 U. S. 529, was the authority for reversing the Circuit Court.

It is true that the Solicitor General in the case of *Knox v. McElligot,* supra, argued as does respondent in this case that *the decision of the jurisdiction in which the joint tenancy was created should not control,* but in the case of *Knox v. McElligot,* supra, the Supreme Court followed the state rule of property and the position of this Court will be inconsistent if it refuses to acknowledge and be bound by the rules of property laid down by the Courts of California or, if it now applies the New York doctrine to a joint tenancy created in the State of California.

It will serve no useful purpose to elaborate upon the basis of the decision of *Knox v. McElligot,* supra, and it will suffice to point out that in New York and California similar statutes were enacted at approximately the same time, imposing a tax upon joint tenancy interests. (See appendix for comparison.) The California statutes have not been given a retroactive application. The State of California, in the exercise of its sovereign power to regulate and control the transmission of property located in that state has definitely determined the status of joint tenancies located in that state. In view of the fact that the status of the joint tenancy property in the instant case was definitely determined before the enactment of the first Federal Estate Tax Act; there is nothing to justify the application of any radical doctrines of foreign states for the solution of this problem and this Court should be bound by the California rule of property.

In *Lederer v. Pearce* (C. C. A. 3) 266 Fed. 497-499, the Court said:

> "From the form of the Federal Estate Tax Act, it is evident the Congress intended that the act should operate not in opposition to but in harmony with the many different state acts with which, because of its very terms, it would come into contact. Lederer v. Northern Trust Co. (C. C. A.) 262 Fed. 52. * * * Thus it appears that the Federal Estate Tax may reach property in one state when it would fail to reach like property in another, according as the laws of distribution and administration vary in different states."

The decision in Baker's Estate (O. C. Phila Co. No. 2100 f. 1931, Phila Legal Intelligencer, September 2, 1932) Pa. 17 D. & C. Ref. 7 is in accord with our contention.

The facts in this case are like the Gwinn case, in that each tenant contributed separate property to the joint tenancy. The Pennsylvania statute quoted in the opinion is similar to the California statutes, which are set forth in the appendix and under Point A. The commonwealth cited *McKelways Estate,* 221 N. Y. 15, 116 N. E. 349, which opinion largely influenced the decision of the District Judge Mayer in *Knox v. McElligot* (not reported). This case held not in point. The opinion in Baker's Estate holds that a joint tenancy agreement is a contract. The case of *Atty. Gen. v. Clark,* supra, holds likewise.

Baker's Estate opinion in effect held that the Act of May 16, 1929 imposing a transfer inheritance tax

upon property held in the joint names of two or more persons is inapplicable to such an estate vested prior to the passage of the statute, although the death of one of the joint tenants occurred thereafter.

Baker's Estate, supra:

> "The rights in the instant case do not pass to the survivor by succession but by reason of the contract of 1927."

B.

RIGHTS ACCRUING TO A SURVIVING JOINT TENANT ACCRUE BY REASON OF THE TRANSFER, WHICH CREATED THE JOINT TENANCY, IF CREATED PRIOR TO SEPTEMBER 8, 1916.

The Circuit Court of Appeals in its opinion in the instant case attempts to justify itself in not following the case of *Carter v. English,* 15 F. (2d) 6, by stating:

> "The California Court in the Gurnsey case made an important reservation in its holding when it said:
>
> 'The statement in McDougald v. Boyd, 172 Cal. 753, that the Act of 1911 did not undertake to impose such tax upon the "right accruing to a surviving joint tenant under the death of his cotenant" is, in our opinion, correct.' " (Tr. 35.)

The Circuit Court failed to include in its opinion the sentence following the above quotation which we believe gives the reason why the Act of 1911 could not impose a tax upon "the right accruing to a surviving joint tenant under the death of his cotenant."

The sentence following is:

> "Some restriction upon the possession and enjoyment of the donee, other than that arising from the law of joint tenancy was necessary, under the previous acts, to bring the transfer within its definition." Estate of Gurnsey, 177 Cal. 211-216.

The above conclusion is an important one for it clearly shows that it was necessary by specific legislation to impose such a tax upon "the right accruing to a surviving joint tenant upon the death of his cotenant." As has been pointed out under Point A of this argument, this Court in the *Tyler* case, supra, stated that the inclusion of such property in the decedent probably could not be justified by the terms of the statute if Section 201 stood alone. But Section 202 definitely includes the property and brings it within reach of the words imposing tax.

Both the Supreme Court of the United States and the Supreme Court of California apparently agree, that, in order that "the right accruing to a surviving joint tenant upon the death of his cotenant," to be subject of a tax, the statute must specifically include such a right in order to bring it within the reach of the words imposing the tax. See *Tyler v. United States,* 281 U. S. 497-502, and *In Re Gurnsey Estate,* 177 Cal. 211-216.

The Supreme Court of California holds that the question of liability to inheritance taxes must be determined by the law in force at the time title vests by virtue of the transfer. (*Estate of Gurnsey,* 177 Cal. 211-214, citing *Hunt v. Wicht,* 174 Cal. 205.)

Therefore, "the right accruing to a surviving joint tenant upon the death of his cotenant" is not subject to estate taxes, if the joint tenancy was created prior to September 8, 1916.

The Circuit Court makes the following holding in the last paragraph of the opinion:

> "The interest of petitioner, held subject to the tax, accrued by reason of the event of the death of the cotenant and not by reason of the transfer, theretofore made which created the joint tenancy." 54 F. (2d) 728-730.

This conclusion of law, we believe to be incorrect with respect to a joint tenancy created prior to September 8, 1916, for the following reasons:

> "By the well established rules of the common law upon the death of one joint tenant the title did not 'vest in the survivor.' The notion of the nature of a joint tenancy entertained by the ancient law writers and jurists was a very peculiar one. The title did not vest or descend upon the death of one tenant. In contemplation of the law each tenant was seised of the whole estate from the first and no change occurred in his title on the death of his cotenant. It simply 'remained' to him. He did not derive the title or estate or any part or interest therein from his cotenant, but wholly from the original grant." *Hannon v. Southern Pac. R. R. Co.,* 12 Cal. App. 350-355. (Extracts from this case are quoted in *Estate of Gurnsey,* supra.)

(The subject of joint tenancy is treated at length in *Hannon v. Southern Pac. R. R. Co.,* supra.)

> "And in Washburn on Real Property, volume 1, page 646, paragraph 14, it is said: 'The interest which a joint tenant has as survivor is not a new one acquired by him from his cotenant upon the latter's death; for his own interest is not changed in amount, but only his cotenant's is extinguished.'" *Hannon v. Southern Pacific R. R. Co.*, 12 Cal. App. 350-356.

The aforegoing clearly shows that the title, right, estate or interest of petitioner did not accrue by reason of the event of the death of the cotenant but accrued by reason of the transfer heretofore made which created the joint tenancy. We submit that we have shown that the premise of Circuit Court cited above is incorrect, therefore, the following conclusion must be in error:

> "There is, therefore, present no attempt to tax an interest made complete and entire prior to the adoption of the Act of 1924."

Rules of law that have been in effect from two to four centuries cannot be lightly cast aside by the Circuit Court of Appeals, and new rules made for the purpose of justifying the imposition of an estate tax. This new rule is a correct one with respect to a joint tenancy created subsequent to September 8, 1916, for the purpose of imposing an estate tax on the value of the interest of decedent accruing to the survivor by reason of the death of his cotenant, but this new rule is not applicable to a joint tenancy created prior to September 8, 1916. The holding that "the interest of petitioner, held subject to the tax, accrued by reason of the event of the death of the

cotenant," is in conflict with the law as expounded by Littleton, Coke, Blackstone and Washburn, and is in direct conflict with the opinion of the Supreme Court of the State of California on this particular subject.

The whole estate continues in the survivor, the same as it would continue in a corporation after the death of one of the incorporators. This has been the settled law for centuries. No good reasons have been set forth in the opinion of the Circuit Court for changing a rule centuries old and construing the new rule to apply to joint tenancies with the right of survivorship regardless of when created. Rights accruing to a surviving joint tenant upon the death of his cotenant, if created prior to September 8, 1916, we claim accrue by reason of the transfer theretofore made, which created the joint tenancy, and all of the aforegoing citations and arguments proves this point.

C.

SECTION 202 (c) OF THE 1916 ACT AND THE SIMILAR PROVISIONS IN THE SUBSEQUENT ACTS INCLUDING SECTION 302 (e) OF THE 1924 ACT WERE ENACTED TO PREVENT TAX AVOIDANCE OR EVASION.

The decision of the Supreme court in the case of *Tyler v. United States,* 281 U. S. 497, did settle one question, that is: the value of the interest of a decedent in a tenancy by the entirety created subsequent to September 8, 1916, no part of which ever belonged to the survivor, is subject to estate taxes under the applicable acts. This decision, however, had the effect

of unsettling questions of law that were considered settled. It caused the Commissioner of Internal Revenue to promulgate on July 3, 1930, Treasury Decisions 4293, 4294 and 4295. ((IX-2) Cumulative Bulletin 425.)

The respondent reversed Treasury Decision 4248, infra, and by way of amendment issued Treasury Decision 4294, infra.

T. D. 4294, infra:

> "The statute extends to joint ownership wherein the right of survivorship exists, regardless of when such joint ownerships were created."

Both the Board of Tax Appeals and the Circuit Court of Appeals in their opinion in the *Gwinn* case cite and rely upon the case of *Tyler v. United States,* supra, as their principal authority. (Tr. 10-Tr. 32.)

Tenancy by the entirety does not exist as a means of property tenure in the State of California.

The facts in the *Tyler* case, supra, are not analogous. There the estates by the entirety under consideration were created after the passage of the applicable revenue act. Here the joint tenancy was created prior to the first estate tax law; the act of September 8, 1916.

The *Tyler* case contains several statements and points of law, which we believe clearly show that this case does not control with respect to a joint tenancy created prior to the first taxing statute.

First. This case dealt only with tenancies by the entirety created subsequent to September 8, 1916, and with respect to all of the estates by the entirety involved in the three cases, this Court said:

> "In each case the estate was created after the passage of the applicable act and none of the property had prior to its creation ever belonged to the surviving spouse."

Second. While it is therein stated that if Section 201 of the Revenue Act of 1916 stood alone it was doubtful whether the terms of the statute included a tenancy by the entirety for the reason that Section 201 imposed a tax on the *transfer* of the net estate. There being no transfer at death in a joint tenancy or tenancy by the entirety, no tax could be imposed, as Section 201 imposed a tax on the transfer.

As previously stated under point A, it was therefore necessary by specific legislation, to bring under Section 202 (c) the taxation of a decedent's interest in a joint tenancy or tenancy by the entirety. Congress changed the common law rule for tax purposes only and subjected to tax the rights accruing to a surviving joint tenant upon the death of his cotenant to be measured in whole or part by the value of such rights.

While it is true that Section 201, Revenue Act of 1916 (39 Stat. 777), imposed a tax upon the transfer of the net estate of every decedent dying after the passage of the act, this case does not specifically provide and it cannot be assumed that Section 202 (c) and the similar provisions of the subsequent acts (including Section 302 (e) and (h) of the 1924 Act) are restrospective in their operation or have any effect on joint tenancy interests created, subsisting and vested prior to September 8, 1916.

While the taxpayers in the *Tyler* case contended that no rights of property were transferred by death,

but the survivor retains only what he already had, following the common law rule and the imposition of a tax would therefore be a direct tax on property and therefore invalid without apportionment. This Court decided that the common law rule did not apply. The tenancies by the entirety were created subsequent to September 8, 1916. Section 202 (c) definitely includes such property and by the inclusion of such estates created after the passage of the act effective at death, no part of which included in the gross estate ever belonged to the survivor, the tax does not *pro tanto* become direct, but is plainly indirect.

There is nothing invalid in taxing this shifting of economic benefits in joint ownerships with right of survivorship created subsequent to September 8, 1916, for there the taxpayers had full knowledge when they created such estates that they would be subject to an estate tax at death. This decision neither directly nor by implication authorizes the application of the taxing statute upon a joint tenancy created prior to September 8, 1916.

Fourth. In the oral argument before the Circuit Court and in the briefs filed, we laid particular stress upon what we thought was the most important part of the *Tyler* case, with reference to the instant case. We contended that Section 201 (c) of the 1916 Act and the similar provisions in the subsequent acts including Section 302 (e) of the 1924 Act were enacted to prevent tax avoidance or evasion.

The Circuit Court's attention was called to the comments on the Tyler decision made by the Supreme Court itself in *Coolidge v. Long,* 282 U. S. 582, and

Phillips v. Dime Trust & Safe Deposit Co., 284 U. S. 160.

In the *Tyler* case, supra, this Court said:

> "The evident and legitimate aim of Congress was to prevent an avoidance in whole or in part, of the estate tax by this method of disposition during the lifetime of the spouse who owned the property, or whose separate funds had been used to procure it and the provision under review is an adjunct of the general scheme of taxation of which it is a part, entirely appropriate as a means to that end."

It is obvious that a statute enacted to prevent tax evasion cannot be applied to a joint tenancy created prior to September 8, 1916. How can one evade or avoid an estate tax by creating a joint tenancy if there was no estate tax law in existence when the joint tenancy was created?

In *Coolidge v. Long*, supra, the question was whether the State of Massachusetts could constitutionally impose an excise tax on succession to property, where the rights had so vested prior to the taking effect of the tax statute, that there was thereafter no occasion in respect of which the excise might constitutionally be imposed. This Court in that case reviewed the case of *Tyler v. United States*, supra, and made the following pertinent statement:

> "It held that the provisions were intended to prevent an avoidance of the estate tax by the creation of such tenancies, and were obviously neither arbitrary nor capricious, and so not violative of the Fifth Amendment."

If similar statutes are retroactively applied as in the instant case, where the joint tenancy was not created to evade or avoid an estate tax and where the rights of the surviving tenant had accrued and vested by reason of the transfer creating the tenancy prior to the enactment of the first taxing statute, then they are arbitrary and capricious and so violative of the Fifth Amendment.

In the case of *Phillips v. Dime Trust & Safe Deposit Co.,* 284 U. S. 160, this Court again reviewed the *Tyler* case, supra, and further explained that the purpose of Section 202 (c) of the Revenue Act of 1916 was to prevent tax evasions by the creation of such tenancies subsequent to September 8, 1916, and taxpayers had knowledge that when they created such tenancies subsequent to September 8, 1916, that the interest of a decedent in such tenancies would be subject to a tax and such a tax is therefore not arbitrarily retroactive.

> "The knowledge available before the creation of the estate that it was embraced within an established taxing system and that its taxation, on the same basis and in the same manner as decedent's estates, was an essential part of the system to prevent evasions, relieves the present tax of the objection that it is arbitrarily retroactive."

The only conclusion that can be drawn from the above citation, when considering the instant case, is that estate tax statutes are arbitrarily retroactive, when made applicable to a joint tenancy created prior to September 8, 1916. As Section 302, Subdivision (h) of the Revenue Act of 1924 was there under con-

sideration with respect to group 2, therefore, Subdivision (h) is arbitrarily retroactive, when it includes under Subdivision (e) (as it does in the instant case) the value of decedent's interest in a joint tenancy created prior to September 8, 1916. This joint tenancy was not created to avoid estate taxes. Decedent and petitioner had no knowledge when this joint tenancy was created, that it was to be embraced within a taxing system that was enacted for the purpose of preventing tax evasion. The present tax is therefore arbitrarily retroactive, and if arbitrarily retroactive it offends the Fifth Amendment.

The case of *Heiner v. Donnan,* 52 S. Ct. 358 was decided on March 21, 1932. Justice Stone, who wrote the dissenting opinion, brings out clearly the point that, we unsuccessfully urged before the Circuit Court, that the decision (in the *Tyler* case) "was rested on the sole and only possible ground," that is: Section 202 (c) of the Revenue Act of 1916 and Section 402 (d) of the Revenue Act of 1921 (which are practically the same as the provisions of Section 302 (e) of the Revenue Act of 1924) were enacted by Congress to prevent tax evasion.

D.

1. THE INTEREST WHICH THE DECEDENT HELD IN THE JOINT TENANCY IMMEDIATELY PRIOR TO HER DEATH WAS EXTINGUISHED BY THAT EVENT.

In view of the fact that this joint tenancy was not created for the purpose of evading or avoiding estate taxes, it therefore does not come within the ambit of

the decision in *Tyler v. United States,* supra. It would appear that this case would fall within the rule laid down in *May v. Heiner,* 281 U. S. 238 for the following reasons:

This joint tenancy was created prior to the act of September 8, 1916, which act changed the common law rule by declaring or deeming that the rights accruing to the surviving joint tenant upon the death of his cotenant accrued by reason of death and not by reason of the transfer, theretofore made which created the joint tenancy. Petitioner, therefore, did not derive the title or estate or any part or interest therein from his cotenant, but wholly from the original grant. No estate passed, ceased or was transferred upon the death of M. A. Gwinn. On the contrary her interest in the joint tenancy upon her death was extinguished by that event and the whole of the joint estate, by virtue of the statute and the conveyance or transfer of the property to the joint tenancy, *belonged to,* rather than passed to her son. (By extinguished we mean to render legally non-existent.) At the death of M. A. Gwinn no interest in the property passed from her to her son; title thereto having become definitely fixed by the joint tenancy deeds made in June 1915. Each owned all of the jointly owned property. No interest ceased or passed at death. Death merely relieved the surviving joint tenant from the further interference of his cotenant, therefore, the deed as joint tenants was sufficient to transfer the property to the petitioner. This case is, therefore, similar to *May v. Heiner,* supra:

"At the death of Mrs. May no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed. *The interest therein which she possessed immediately prior to her death was obliterated by that event.*" (Italics ours.)

The learned Circuit Court in the instant case made the following holding:

"When petitioner's mother died, the interest which she had in the property held in joint tenancy (that interest was a real interest subject, during her lifetime, to be transferred or otherwise terminated), ceased by reason of her death and only because of that event. Hence it was taxable." (Tr. 39.)

We understand the aforegoing sentence to mean this: The interest of decedent held in the joint tenancy property ceased by reason of her death and only because of that event, for the reason decedent had the power during her lifetime to transfer or terminate her interest. Hence it was taxable.

If the power of decedent to transfer or terminate her interest must be exercised during her lifetime and prior to death, then neither the power to transfer or terminate ceased at death nor did her interest cease at death. If no interest could be transferred or terminated at death, then no interest ceased or existed at death.

Green v. Skinner, 185 Cal. 435-438:

"On the other hand, the severance or attempted severance must take place before the death of such

> cotenant and before the other, as a consequence, has become the owner of the whole by virtue of his right of survivorship. The question in the case stated, therefore, reduces itself into one as to when the deed to the defendant from his grandfather took effect: Was it before or after the latter's death?"

The learned Circuit Court has attempted to apply a principle of law expressed in the cases of *Reinecke v. Northern Trust Co.,* 278 U. S. 339, and *Chase National Bank v. United States,* 278 U. S. 327, to the instant case, "that a transfer, made subject to a power of revocation in the transferor, terminable at death, is not complete until his death." This power is different from a power to transfer or terminate, which must be exercised during lifetime or prior to death, and cannot be exercised at death.

> *Knowlton v. Moore,* 20 S. Ct. 747-754, 178 U. S. 41:
>
> "Confusion of thought may arise unless it be always remembered that, fundamentally considered, it is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties."

Decedent did not have the power to transmit any interest in property by death, nor did petitioner legally receive any interest in property by death.

The case of *Lynch v. Congdon,* 1 Fed. (2d) 133, was decided on a question of construction. The interest of decedent that ceased at death, was taxable, was the

theory urged by the Government, but it was not followed by the Eighth Circuit Court of Appeals for the reason that the joint tenancy:

> "gave her (Clara B. Congdon) a present joint ownership of the funds represented by the certificates and the right of sole ownership if she survived him. This transaction was complete before the passage of the act. Unless the act providing for such tax is retrospective in its operation, the tax assessed and collected was invalid. The Supreme Court settled this question as to this very act in Shwab v. Doyle, 258 U. S. 529."

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2. WHEN THE REASON FOR THE RULE CEASES SO DOES THE RULE.

A new theory of law with respect to the taxation of the interest of decedent in a joint tenancy has been advanced by respondent: This new theory was first advanced by respondent in his brief and argument before the Circuit Court. It has again been advanced by respondent in his brief in opposition to the petition for a writ of certiorari. It is as follows:

> "During the lifetime of the decedent it was within her power to sever the joint tenancy and thus destroy the right of survivorship: the termination of this power on the decedent's death is the proper subject of an estate tax." (Page 4, Brief in opposition.)

The new rule advanced by respondent is founded on the following rule:

> "that a transfer made subject to a form of revocation in the transferor, terminable at his death, is not complete until his death." (Reinecke v. Northern Trust Co., 278 U. S. 339, 49 S. Ct. 123-125.)

which is in turn, an enlargement of the following rule of law that was first stated in its present form by this Court in the case of *Saltonstall v. Saltonstall,* 278 U. S. 260, 48 S. Ct. 225-227:

> "A power of appointment reserved by the donor, leaves the transfer, as to him, incomplete and subject to tax."

The imposition of a succession tax in the *Saltonstall* case, supra, was upheld on two grounds: First, the non-exercise of the reserved power in Brooks' lifetime, as the provisions of the trust provided for change or termination by the settlor with the consent of one trustee. This created a power of appointment within the meaning of St. Mass. 1909 C. 527 Sec. 8 and secondly, the interest of the beneficiaries took effect in possession or enjoyment after his death within the meaning of St. Mass. 1916, C. 268, Sec. 1.

In this case we are not concerned with the first ground of the *Saltonstall* case, supra, as it applies only to a power of appointment which is not applicable here. The underlying reason for the tax on the second ground was the fact that the donor never really parted with his gift until death. Only at death did the beneficiaries come into possession or enjoyment of the property. The transfer was therefore incomplete and subject to tax.

The case of *Reinecke v. Northern Trust Co.*, supra, dealt with transfers in trust made prior to the Revenue Act of 1921. In 1903 and 1910 the decedent created two trusts under which the income was reserved to the decedent for life and on his death was to be paid to a certain designated person. However, the decedent reserved to himself a power of revocation of the trusts. Five more trusts were created in 1919. The trustor could not effect any change in the beneficial interests in the trusts without the consent, in the case of four of the trusts, of the single beneficiary of each trust and as the case of one trust, without the consent of the majority so entitled. We are concerned here most with history of the rule and the reasons underlying it. In *Reinecke v. Northern Trust Co.*, supra, the rule was enlarged to include other than transfers under a power of appointment.

> "But in No. 77, Chase National Bank v. United States, 278 U. S. 327, 49 S. Ct. 126, 73 L. Ed.— decided this day, the decision is rested on the ground, earlier suggested with respect to the Fourteenth Amendment in Saltonstall v. Saltonstall, 276 U. S. 260-271, 48 S. Ct. 225—72 L. Ed. 565, that a transfer made subject to a power of revocation in the transferor, terminable at his death, is not complete until his death." (49 S. Ct. 123-125.)

The attention of the Court is called to the fact that the respondent in his rule states that the proper subject of an estate tax is the termination of this power.

> "The termination of this power on the decedent's death is the proper subject of an estate tax."

In both *Reinecke v. Northern Trust Co.,* supra, and *Chase National Bank v. United States,* supra, it is the incomplete transfer that is subject of the tax not the termination of the power, although it is stated in *Chase National Bank* case, supra:

> "Such an outstanding power residing exclusively in a donor to recall a gift after it is made is a limitation on the gift which makes it incomplete as to the donor as well as to the donee, and we think that the termination of such a power at death may also be the appropriate subject of a tax upon transfers." 49 S. Ct. 126-128.

But the termination of the power of disposition standing alone could not be the subject of a tax, there must be also the possession and enjoyment of the property transferred to the beneficiaries in order to properly subject the transfer to a tax.

The real question at issue was whether the seven trusts were properly included under the provisions of Section 402 (c) of the Revenue Act of 1921 and subject to the tax imposed by Section 401 of the Revenue Act of 1921. (42 Stat. 277-278.) The taxation of the seven trusts hinged upon the meaning of the following words contained in Section 402 (c) "to take effect in possession and enjoyment at or after death."

The two trusts were held subject to the tax for the reasons that the trust gift was not complete due to the power of revocation, and the transfer held subject to the tax was intended to take effect in possession and enjoyment at or after death.

The five trusts were held not subject to the tax for the reason that the trust gift was complete and "had passed as completely from any control by decedent which might inure to his benefit as if the gift had been absolute." This trust gift in the form of a life estate in one with remainder over to another at or after the donor's death did not fall within the meaning of the phrase in Section 402 (c) "to take effect in possession or enjoyment at or after death."

This Court in *Reinecke v. Northern Trust Co.*, supra, said:

> "In the light of the general purpose of the statute and the language of Section 401 explicitly imposing on net estate of decedents, we think it is at least doubtful whether the trusts or interest in a trust intended to be reached by the phrase in Section 402 (c) 'to take effect in possession or enjoyment at or after his death,' include any other than those passing from the possession, enjoyment or control of the donor at his death and so taxable as transfers at death under 401. That doubt must be resolved in favor of the taxpayer." 49 S. Ct. 123-126.

The reason for the rule "that a transfer made subject to a power of revocation in the transferor, terminable at his death, is not complete until his death" is based upon the fact that the transfer held subject to the tax is intended "to take effect in possession and enjoyment at or after death."

This Court in *Coolidge v. Long*, supra (51 S. Ct. 306-310), said:

> "No act of Congress has been held by this court to impose a tax upon possession and enjoyment, the right to which had fully vested prior to the enactment."

Same case:

> "This court has not sustained any state law imposing an excise tax upon mere entry into possession and enjoyment of property, where the right to such possession and enjoyment upon the happening of a specified event had fully vested before the enactment."

The respondent relies principally upon the cases of *Saltonstall v. Saltonstall,* supra, *Reinecke v. Northern Trust Co.,* supra, and *Chase National Bank v. United States,* supra, where donors made gift *inter vivos,* subject to the power of revocation and the right to change the beneficiary. The real subject of the tax in those cases was the "possession and enjoyment" of the property passing to the beneficiaries at or after death.

These cases have application here, *Estate of Gurnsey,* 177 Cal. 211-216-217:

> "The appellant refers to many cases where gifts and other transfers were made by the decedent in his lifetime, but the control of the property was retained by him, and where from the circumstances the court deduced the conclusion that the transfer was made in contemplation of death, or to take effect in possession and enjoyment after death. *These cases have no application here.* The finding of the court below, upon sufficient evidence to sustain it, that this transfer was

not made in contemplation of death, or to take effect in possession or enjoyment at or after death, excludes the basis upon which these decisions were founded." (Italics ours.)

Attorney General v. Clark, supra:

"It cannot be found that there was a gift of one half of the property to take effect in possession and enjoyment after the decease of the testatrix so as to be taxable under the statutes because the joint tenancy was not severed during the lifetime of the tenants."

The rule, therefore, does not apply to a joint tenancy created prior to September 8, 1916, for the reason that possession and enjoyment of the whole passed to the survivor at the time of the transfer, which created the joint tenancy, and not at or after death.

"Maxims of Jurisprudence, Section 3510 Civil Code of California. When the reason of a rule ceases so should the rule itself. Enacted March 21, 1872, based on Field Draft. N. Y. Civil Code, Section 1965."

It is, therefore, obvious that if the reason for the rule does not exist in a joint tenancy created prior to September 8, 1916, then the rule is not applicable to this case, for when the reason of a rule ceases, so should the rule itself.

3. A TRANSFER TO A JOINT TENANCY, NOT MADE SUBJECT TO THE POWER OF REVOCATION IN THE TRANSFEROR WITHOUT THE CONSENT OF THE BENEFICIARY, AND NOT MADE SUBJECT TO THE POWER TO CHANGE THE BENEFICIARY EFFECTIVE AT OR AFTER DEATH, IS TERMINABLE ONLY PRIOR TO DEATH AND IS COMPLETE AT DEATH.

Chase National Bank v. United States, 278 U. S. 327: This case involved the questions whether the tax imposed by the final clause of Section 402(F) Revenue Act of 1921 (42 Stat. 278) on life insurance policies payable in terms to beneficiaries other than the decedent or his estate is a direct tax on property and void because not apportioned, and whether the tax imposed bears such an unreasonable relation to the subject matter as to render it void.

Section 401 of the Act of 1921 (42 Stat. 278) imposed an estate tax on the net estate, and specifically included under Section 402(F) the amount of life insurance to be received by an executor under policies taken out by decedent, as well as the excess over $40,000.00 received by all other beneficiaries under policies taken out by decedent upon his own life.

The ordinary life insurance policy is similar to a gift under a transfer in trust with the power of revocation. The trustor in a trust may be compared with the insured; the trustee may be compared with the insurer, and the beneficiary may be compared with the beneficiary of a life insurance policy. A life insurance policy, however, cannot be compared with an estate in joint tenancy.

Upon what grounds did this case fall within the following rule governing *Saltonstall v. Saltonstall*, supra?

> "A power of appointment reserved by the donor leaves the transfer, as to him, incomplete and subject to tax."

The transfer which was taxed in the *Chase National Bank* case was the termination of the power or right to change the beneficiary and the coming into possession and enjoyment of the property by the beneficiary (but this did not occur until the death of the insured). In its final analysis, the measure of the tax is the value of the property transferred to the beneficiary for her possession and enjoyment. Possession and enjoyment of the property transferred to the beneficiary in a revocable trust, and possession and enjoyment of the property passing to the beneficiary in a life insurance policy containing the power of revocation as to the beneficiary, is the real subject of the tax.

> "The precise question presented is whether the *termination at death of that power* and the *consequent passing to the designated beneficiaries of all rights* under the policies freed of the possibility of its exercise may be the legitimate subject of a transfer tax." *Chase National Bank v. United States*, 278 U. S. 327; 49 S. Ct. 126-127. (Italics ours.)

These two essential elements stated above must exist in the instant case if the case of *Chase National Bank*, supra, is to control here. If these two factors

do not legally exist, then this case does not control and is not applicable. In the instant case, the gift *inter vivos* was not testamentary and neither title, possession, nor enjoyment passed at death. The gift was made before September 8, 1916, and over nine years before the death of M. A. Gwinn. If we are going to compare the cases of *Saltonstall, Reinecke,* and *Chase National Bank,* supra, with the instant case to see if they control, when making comparisons, those things which are compared must be identical or similar in pertinent factors, to make possible even an approximation to the truth.

The rule in its present form, stated in the cases of *Reinecke* and *Chase National Bank,* supra, was founded upon the fact that the trustor or the insured had *exclusive* control of the gifts made *inter vivos,* but effective only at death. The gifts made *inter vivos* were not subject to a joint control. The donor could recall his gift, or change his beneficiary and do as he pleased with his property up to the time of his death. The donor had no adverse interest in the gift. The donor did not have to get the consent of his beneficiary to recall the gift. The nonexercise of the power to recall the gift freed the beneficiaries of the possibility that the gift would be recalled or the beneficiary changed.

It is, therefore, evident that the donor could recall the gift and change the beneficiary of the trusts or the life insurance policies, and this power was not terminated until death. The donor controlled the disposition of the gifts up until his death, and possession

and enjoyment of the property passed to the beneficiaries only at or after death. This last point is important, as we will show.

In the case of *Chase National Bank v. United States,* supra, it was pointed out:

> "The power of disposition is reserved *exclusively* to the transferor for his own benefit. Such an outstanding power residing *exclusively* in the donor to recall a gift after it was made is a limitation on the gift which makes it incomplete as to the donor as well as the donee." (Italics ours.)

This point is important: The power to recall and the right to change the beneficiary. Did the decedent, M. A. Gwinn, up to the time of her death, have the power to make a gift of her interest in the joint tenancy with the power to recall and the right to change her beneficiary? The answer is no.

These powers did not cease at death like in the cases involving gifts *inter vivos* upon which respondent relies. The distinction between the *Gwinn* case and the cases respondent relies upon, supra, is that in the *Gwinn* case the gift was complete as to the beneficiary; whereas, in the cases respondent cites, the gifts were incomplete, due to the fact that the donor had the power to recall the gift and the right to change his beneficiary.

A joint tenant is the opposite of a sole tenant. A sole tenant, as well as the donor of a revocable trust, has exclusive control of his property; this is also true of the insured in a life insurance policy. A joint

tenant is subject to a joint control of the joint property. The joint tenant does not control the disposition of the gift *inter vivos* up to the moment of his death so that he could change his beneficiary effective at or after death like the insured or the donor of a revocable trust.

The joint tenant cannot effect any change in his beneficiary to take effect at or after death. The joint tenant cannot recall the gift *inter vivos* like the donor or insured. In order to recall the gift and sever the joint tenancy he must secure the consent of his cotenant; if he cannot secure this consent, to regain the gift or its value the joint tenant must file a suit for partition. This may result in receiving different property than that contributed to the joint tenancy or it may result in the sale of the gift property to the detriment of the plaintiff. Unlike the donor of a revocable trust, the joint tenant cannot recall the same gift. A division must be made according to the respective rights of the joint tenants.

Section 752, *California Code of Civil Procedure,* gives to either party a right of partition:

> "When several cotenants own real property as joint tenants * * * an action may be brought by one or more of such persons for a partition thereof according to the respective rights of the persons interested therein, and a sale of such property, or a part thereof, if it appears that a partition cannot be made without great prejudice to the owners."

Section 752a, *Code of Civil Procedure,* deals with partition of personal property. (1923 Edition.)

If the decedent, M. A. Gwinn, made a gift of her interest in the joint tenancy, the gift would have to be absolute in order to sever the joint tenancy. She could not make a revocable gift of the jointly owned property like the donor or insured. The decedent, M. A. Gwinn, could not dispose of her joint tenancy interest by a will. (33 *C. J.* 915 and cases cited.)

The decedent, M. A. Gwinn could not retain control of her gift *inter vivos* and at the same time have possession and enjoyment pass to a different beneficiary at or after death. The surviving joint tenant would take precedence over the donee. The donor of a revocable trust or the insured can change his beneficiary to take effect at or after death.

Green v. Skinner, 185 Cal. 435-440:

"But here the plaintiff does not for any purpose stand in the shoes of the defendant's grantor. Her right was wholly independent of him. It was, to be sure, a right which he had the power to destroy by a severance of the joint tenancy upon which they held the property, but, *unless this power was exercised in his lifetime, the right became complete as an incident of their tenancy.* (5) It is an old rule, in other words, that the joint tenant who survives does not take the moiety of the other from him or as his successor, but by right under the devise or conveyance by which the joint tenancy was created in the first instance. (Freeman on Cotenancy and Partition, sec. 28.)" (Italics ours.)

The case of *Green v. Skinner,* supra, clearly shows that the power to destroy, by a severance of the joint tenancy upon which they held the property, must be exercised in his lifetime otherwise the right of the surviving joint tenant became complete as an incident of the joint tenancy. The transfer was not made incomplete by the failure to sever the joint tenancy. The transfer was made complete by the instrument which created the joint tenancy.

The power of revocation of the gift *inter vivos* in the joint tenancy does not terminate at death like the power of revocation possessed by a donor of a revocable trust or the insured, who could recall the gift and change their beneficiary; the power of disposition remained in them up to the moment of death and the disposition of the property was effective only at or after death.

The joint tenant did not have the power to recall the gift without the consent of his cotenant and the joint tenant did not have the power to effect a disposition of her joint interest to another beneficiary to take effect at or after death. The distinction between exclusive control and joint control is quite clear.

The powers the joint tenant possessed did not terminate at death, but terminated prior to her death; this may be best illustrated by the *Chase National Bank* case, supra. There the insured had control of the policies up to the moment of his death with the power to recall the gift or change the beneficiary. This power terminated at death, thereby freeing the

beneficiaries of the possibility of the recall of the gift or the change in beneficiaries. Only at death did possession and enjoyment pass to the beneficiary.

The joint tenant could not control her gift up till death, and at the same time make a change in the beneficiary effective at or after death, such as the trustor and insured could do. This illustration clearly shows the distinction between a sole tenant and joint tenant. A power of revocation in a sole tenant terminates at death thereby making the transfer incomplete. The power of revocation in a joint tenancy terminates prior to death and must be exercised during lifetime. The power of revocation as to his beneficiary is not effective at or after death. A power of revocation in the transferor terminable at his death is different from the power to sever a joint tenancy which must be exercised in his lifetime. The failure to revoke the power in the first instance makes the transfer incomplete at his death, whereas the failure to sever the joint tenancy in his lifetime does not make the transfer incomplete for the reason that in one case the transfer was never completed as to the beneficiary, whereas in the other case the transfer was complete when the joint tenancy was created. In the first instance the power of revocation terminated at death, and it took death to effect the transfer to the beneficiary. In the second instance the power of revocation terminated immediately prior to death and death did not effect any transfer to the beneficiary.

Therefore the rule "that a transfer made subject to a power of revocation in the transferor, terminable at death, is not complete until his death," is not applicable to a joint tenancy where the power to sever or terminate must be exercised during the lifetime.

Mr. Justice Stone in his dissenting opinion in *Heiner v. Donnan,* supra, in which this Court held unconstitutional the provision (Sec. 302 (c) of the Revenue Act of 1926) by which a gift made within two years of death should be conclusively presumed to have been made in contemplation of death, makes the following comments and brings out the distinction we are endeavoring to show here.

> * * * "In Tyler v. United States, 281 U. S. 497, we upheld taxation, * * * although the gift was not testamentary and neither title, possession, nor enjoyment passed at death. Similar taxation of gifts made inter vivos, but finally effective only at death, was sustained in Reinecke v. Northern Trust Co., 278 U. S. 339, and Chase National Bank v. United States, 278 U. S. 327; see Taft v. Bowers, 278 U. S. 470, 482."
> * * * * * * *

Mr. Justice Stone also makes the following pertinent comment:

> "* * * A very different case would be presented if the taxed gift were made before the enactment of the taxing statute and many years before the death, as in Frew v. Bowers, 12 F. (2d) 625, 630. See Nichols v. Coolidge, supra. * * *."

In the *Tyler, Reinecke* and *Chase National Bank* cases "possession and enjoyment" of the gift prop-

erty was transferred to the beneficiary at death after the enactment of the taxing statute, therefore, a very different case exists here for the reason "possession and enjoyment of the whole" of the joint tenancy passed to the beneficiary prior to the first taxing statute of September 8, 1916.

The principles of law expressed in the cases of *Reinecke* and *Chase National Bank,* supra, are applicable to transfers in trust and life insurance contracts, each containing the power to revoke and the power to change the beneficiary, where sole tenants are the donors with exclusive control.

E.

1. THE WORD "BEFORE" IN SUBDIVISION (H) OF SECTION 302, ACT OF 1924, PROPERLY CONSTRUED MEANS BEFORE JUNE 2, 1924, TO SEPTEMBER 8, 1916.

This Court in the case of *Phillips v. Dime Trust & Safe Deposit Co.,* supra, made the following statement:

> "As Section 302 (h) of the Act of 1924 (26 U. S. C. A. Sec. 1094 note) specifically makes the quoted provision of subdivision (e) applicable to estate created or existing before the passage of the statute, the question presented is not one of its construction or applicability, but of the power of Congress to impose the tax."

This Court in the *Phillips* case, supra, although it did not expressly say so, construed by implication the word "before" in Section 302 (h) to mean before

June 2, 1924, to September 8, 1916, with reference to the provisions of subdivision (e) of Section 302, Act of 1924. (Act of 1924 enacted June 2, 1924, Act of 1916 enacted September 8, 1916.) This is the construction we contend should be placed on the word "before" in the instant case.

The respondent himself placed this construction on the word "before" in Treasury Decision 4248 (infra) in his first construction of Section 302 (h), Act of 1924, such construction being restricted to subdivision (e) of Section 302.

> "The statute applies only to joint ownerships based on the right of survivorship and created subsequent to September 8, 1916." (T. D. 4248, infra.)

It had long been contended by attorneys up to the time of the decision of this Court in *Phillips v. Dime Trust & Safe Deposit Co.,* supra, that each estate tax law enacted since February 24, 1919, to February 26, 1926, (1918 Act to 1926 Act) in effect repealed all of the provisions of the previous acts and that the successive acts are given a retroactive application if applied to transactions entered into before the applicable act. The *Phillips* case, supra, brings out the point that any joint tenancy or tenancy by the entirety created subsequent to September 8, 1916, is subject to tax to the extent of the interest of decedent at death. One would assume from reading the cases of *Tyler v. United States,* supra, and *Phillips v. Dime Trust & Safe Deposit Co.,* supra, which cases are the landmarks on the subject con-

tained therein; that September 8, 1916, was the starting point for the establishment of a taxing system that embraced within it, and subjected to tax, the value of the interest of a decedent in any joint tenancy or tenancy by the entirety created subsequent to September 8, 1916.

The respondent as the result of his interpretation of the *Tyler* case, supra, ignoring the fact that "the decision rested on the sole and only possible ground," that is: tax avoidance, or evasion, proceeds to construe the word "before" in Section 302 (h) Act of 1924 (43 Stat. 303) as meaning "regardless of when created."

> "The statute extends to joint ownerships wherein the right of survivorship exists, regardless of when such joint ownerships were created." (T. D. 4294, infra.)

Congress at the time it enacted the Revenue Act of 1924 was familiar with the case of *Shwab v. Doyle,* decided May 1, 1922, 258 U. S. 529, which case hinged upon the construction of the words "at any time" contained in Section 202 (b) Estate Tax Act of 1916. (39 Stat. 777-780.)

If Congress intended that the word "before" should mean, prior to September 8, 1916, or "regardless of when created," Congress would have so stated in subdivision h, Section 302. There is nothing to justify the construction the respondent has placed upon the word "before" contained in Section 302 (h) of the 1924 Act (43 Stat. 303) as meaning to

include under subdivision (e) of Section 302, joint tenancies created prior to September 8, 1916.

The respondent has construed the word "before" in Section 302 (h) Act of 1924 twice, each time differently. (See T. D. 4248-4295 infra.) What this Court said in *Shwab v. Doyle,* supra, is applicable here.

Shwab v. Doyle, supra:

> "He fixes no period to the retrospect he declares, but reserves, if he be taken at his word, the transfers of all times to the demands of revenue. In this there is much to allure an administrative officer. Indeed, its simplicity attracts any one. It removes puzzle from construction and perplexity and pertinence on account of the distance of death from the transfer, risking no chances of court or juries, in repugnance or revolt, taking liberties with the act to relieve from its exaction to satisfy the demands of revenue."

The holding of this Court in the case of *Phillips v. Dime Trust & Safe Deposit Co.,* supra, with respect to group 3 (joint tenancy) supports our contention:

> "Group 3 * * * If after, the tax was rightly laid, for reasons already stated, which support the tax with respect to the items in group 2."

The reasons that supported the tax with respect to Group 2 were the *Tyler* case, supra, and the fact that taxpayers had knowledge when they created joint estates subsequent to September 8, 1916, that such estates were to be embraced in a taxing system

whose object was to prevent tax avoidance or evasion by the creation of such estates, "relieves the present tax of the objection that it is arbitrarily retroactive."

The only conclusion that can be drawn from the above citation and Group 2, is that, a tax is arbitrarily retroactive when the respondent construes the word "before," as including in the gross estate, the value of the interest of decedent in a joint tenancy created before September 8, 1916, and subjecting the value of this interest to a tax. The tax, therefore, is wrongly laid. The rights of the joint tenants were fixed and determined by law prior to September 8, 1916, and it was never intended that such joint tenancies were to be included in a taxing system whose sole object was to prevent tax avoidance or evasions by the creation of such estates after September 8, 1916. The tax assessed and the tax proposed to be assessed is therefore arbitrarily retroactive, and if arbitrarily retroactive it offends the Fifth Amendment.

It is not necessary for this Court to declare Section 302 (h) of the Revenue Act of 1924 (43 Stat. 303) unconstitutional, in so far as it requires the inclusion under subdivision (e), the value of the interest of decedent in a joint tenancy created before September 8, 1916, and subjecting same to the tax imposed by Section 301. The same construction can be placed on the word "before" by this Court, as was made by the respondent in Treasury Decision 4248 (infra). The sole reason for amending Treasury Decision 4248

by Treasury Decision 4294 (infra) was based on the decision of this Court in the *Tyler* case, supra. The subsequent reviews of this case in the opinions in *Coolidge v. Long,* supra, *Phillips v. Dime Trust & Safe Deposit Co.,* supra, and *Heiner v. Donnan,* supra, shows that the purpose of Congress in enacting Section 202 (c) of the Revenue Act of 1916 (39 Stat. L. 777) and the similar provision in the subsequent acts was to prevent an avoidance or evasion of estate taxes by the creation of such estates subsequent to September 8, 1916, and the decision rested on this sole and only possible ground. There is now, therefore, no authority for the amendment made by respondent in Treasury Decision 4294 (infra). The construction made by respondent of the word "before" in Treasury Decision 4248 (infra) was the construction that Congress intended should be placed on this word. If Congress meant before September 8, 1916, with respect to subdivision (e) of Section 302, Congress should have so stated in clear, strong and imperative words.

Shwab v. Doyle, supra:

> "There is certainly in it no declaration of retroactivity, 'clear, strong, and imperative,' which is the condition expressed in United States v. Heth, 2 Cranch, 399, 413 (2 L. Ed. 479); also United States v. Burr, 159 U. S. 78, 82, 83, 15 Sup. Ct. 1002, 40 L. Ed. 82.
>
> If the absence of such determining declaration leaves to the statute a double sense, it is the command of the cases that that which rejects retroactive operation must be selected."

The word "before" will have *a double meaning* if construed to mean "regardless of when created," when it has already been construed by implication to mean before June 2, 1924, to September 8, 1916. Congress meant "before" to mean before June 2, 1924, to September 8, 1916, with respect to subdivision (e) of Section 302. Congress never intended "before" should include interests vested prior to September 8, 1916.

Congress in enacting Section 302 (h) of the Act of 1924, as retroactive to September 8, 1916, did so with the sole purpose of settling such a point as was raised by counsel in the case of *Phillips v. Dime Trust & Safe Deposit Co.,* supra:

> "But it is urged that the tax imposed with respect to groups 2 and 3 is invalid. As the creation of the tenancies by the entirety antedated the taxing statute and the earlier corresponding section had been repealed, it is insisted that the statute is given a retroactive operation such as that condemned by this court in" * * *

The statements of this Court under Group 2, *Phillips* case, supra, with reference to the aforegoing contention, by implication construes "before" to mean before June 2, 1924, to September 8, 1916.

2. SECTION 302 OF THE REVENUE ACT OF 1924 IS UNCONSTITUTIONAL IN SO FAR AS IT REQUIRES UNDER SUBDIVISION (H) THAT THERE SHALL BE INCLUDED UNDER SUBDIVISION (E) FOR THE PURPOSE OF IMPOSING THE TAX UNDER SECTION 301, THE VALUE OF DECEDENT'S INTEREST IN PROPERTY HELD AS JOINT TENANTS, WHICH JOINT TENANCY WITH RIGHT OF SURVIVORSHIP WAS CREATED, TRANSFERRED AND VESTED IN SURVIVOR IN JUNE, 1915, PRIOR TO THE ENACTMENT OF THE REVENUE ACT OF 1916.

If construed retroactively, Section 302 (h) and (e) are unconstitutional because:

(1) It takes private property without due process of law. It takes private property for a public use without compensation. It is arbitrary and so capricious as to amount to confiscation and offends the Fifth Amendment.

(2) It imposes a direct tax in violation of Article 1, Section 9, clause 4 of the Constitution.

A decedent at his death did not have the power to transfer, transmit or terminate his interest in the joint estate, therefore, as no interest could be transferred, transmitted or terminated at death, no interest ceased by reason of death or existed at death. Hence it was not taxable.

A joint tenancy created prior to September 8, 1916, did not at death transmit any property rights from the dead to the living, therefore, a tax imposed after September 8, 1916, on the interest of a decedent in a joint estate created prior to September 8, 1916, would be imposed not on the transmission or receipt of property by death, but on the creation of the joint tenancy.

Is the statute constitutional as applied to a joint tenancy created and transferred in June, 1915, long before the passage of the Revenue Act of 1924? In our opinion the act, if so construed is void as denying due process of law and as violating the Fifth Amendment to the Constitution. Especially will a legislative act not be construed to be retrospective when vested rights are thereby affected. *Auffm'ordt v. Rasin,* 102 U. S. 620, is in point. There the rights of the parties were fixed before an amendatory act of Congress was passed, an assignee in bankruptcy having acquired a vested right in certain securities or their value. Mr. Justice Miller, in the opinion of the Court, said (p. 622):

> "If it be conceded that Congress could do this, the principle is too well established to need the citation of authorities, that no law will be construed to act retrospectively unless its language imperatively requires such a construction. * * * and we see no reason to believe that in making a new rule on that subject Congress intended to make it retrospective, for the purpos of destroying rights of property or rights of action which had become vested before the passage of the law."

On September 8, 1916, Congress made a new rule under Section 202 (c), changing a rule centuries old for taxation purposes only. Section 302 (e) of the 1924 Act is similar to 202 (c). Section 302 (h) of the same Act as construed by the respondent does the thing this Court condemned in the above opinion.

Lewellyn v. Frick, 258 U. S. 238, is also in point:

> "Acts of Congress are to construed if possible in such a way as to avoid grave doubts of this kind, Panama R. R. Co. v. Johnson, 264 U. S. 375, 390, 44 S. Ct. 391, 68 L. Ed. 748. Not only are such doubts avoided by construing the statute as referring only to transactions taking place after it was passed, but the general principle 'that laws are not to be construed as applying to cases which arose before their passage' is preserved, when to disregard it would be to impose unexpected liability that if known might have induced those concerned to avoid it and to use their money in other ways * * *."

The following citation is a continuation of the above; it is interesting in that it expresses an opinion on Section 302, Revenue Act of 1924, subdivision (h) the section here under consideration.

Lewellyn v. Frick, 268 U. S. 238:

> "* * * go far toward deciding the one now before us. They also indicate that the Revenue Act of 1924, c. 234, 302 (h), 43 Stat. 253, 305, making (g) (the equivalent of (f) above) apply to past transactions, does not help but if anything hinders the Collector's construction of the present law. Smietanka v. First Trust & Savings Bank, 257 U. S. 602, 42 S. Ct. 223, 66 L. Ed. 391."

The learned Circuit Court states that the case of *Nichols v. Coolidge,* 274 U. S. 531, is not in point.

Nichols v. Coolidge, supra:

> "Certainly Congress may lay an excise upon the transfer of property by death, reckoned upon

the value of the interest which passes thereby. But under the mere guise of reaching something within its powers. Congress may not lay a charge upon what is beyond them. Taxes are very real things, and statutes imposing them are estimated by practical results."

Is not the respondent in his construction of subdivision (h) Section 302, 1924 Act, attempting to lay a charge on something which is beyond him?

The respondent is certainly reaching for something beyond him, when he includes joint ownerships with right of survivorship created prior to September 8, 1916, in the same class as joint ownerships with the right of survivorship created subsequent to September 8, 1916. Those joint ownerships created subsequent to September 8, 1916, were specifically declared or deemed by Congress in order to prevent tax evasion to be the subject of a transfer tax at death, to be measured by the value of decedent's interest in property held in joint ownership with right of survivorship, even though there were no legal transfer of property at death.

And we submit that Section 302 (h) of the statute here under consideration in so far as it requires that there shall be included under subdivision (e), (a statute enacted to prevent tax evasion) the value of decedent's interest in a joint tenancy created before September 8, 1916 (and not created to evade taxes) is, therefore, arbitrary and so capricious, so as to offend the Fifth Amendment.

Wherein and what way will Sections 302 (h) and (e), Act of 1924, as construed retroactively by the respondent in the instant case, violate the Constitution in the several ways enumerated.

The estate tax law of 1924 provides for a tax in the nature of an excise tax, upon the right or privilege of transmitting property at death. Consequently before the tax can attach there must be a transfer at death, in some shape or form.

Joint tenancies and tenancies by the entirety created prior to September 8, 1916, were not a part of a taxing system levied on estates passing at death by will or inheritance. Joint ownerships based upon the right of survivorship created after September 8, 1916, were specifically included in the 1916 Act and all subsequent acts in order to prevent tax evasion.

Congress can declare or deem that a transfer takes place at death with respect to a joint tenancy or tenancy by the entirety created subsequent to September 8, 1916. It is only in that event or in those circumstances, that a tax can be due under said law. Now, where, as in the case at bar, the joint tenancy was created, transferred and vested in June, 1915, nine years before the passage of the 1924 Act and over nine years before the death of the transferor and where the property passed and takes effect both as to title and possession and enjoyment of the whole, no transfer of that property takes place at the death of the transferor and, therefore, no tax, under this law accrues.

Congress in effect declared on September 8, 1916, when it enacted Section 202 (c) to prevent tax evasion, that all those joint ownerships that were created prior to September 8, 1916, were not within the scope of the law.

> *Phillips v. Dime Trust & Safe Deposit Co.*, supra, Group 2:
>
> "Group 2. The tenancies in all of the items of the second group were created after the passage of the 1916 Revenue Act. Congress had by that act adopted a system of death taxes, embracing, as it lawfully might, estates by the entirety. As was pointed out in Tyler v. United States, supra, pages 503, 505 of 281 U. S., 50 S. Ct. 356, 359, such estates are appropriate subjects of death taxes and the taxation of them is a suitable measure to prevent evasion of a system of taxation levied on estates passing at death by will or inheritance."

Hence, if in spite of the fact that no transfer takes place at the death of the transferor and no transfer was declared or deemed to take place at death like in those joint estates created subsequent to September 8, 1916, the respondent levies and collects a death or transfer tax, he taxes something that never existed; that never took place. Now, if all this be true, if no transfer took place at death of decedent and none was declared or deemed to take place at death like in joint estates created subsequent to September 8, 1916, and the respondent, notwithstanding these facts, proceeds to levy upon and collect from the estate of decedent

a transfer tax measured by the value of property transferred by decedent during her life, and under which transfer the transferee became at once entitled to the title and possession and enjoyment of the whole of the property transferred, then manifestly, the amount of tax so collected and the present tax, is not a transfer or excise tax because, as to the particular property, there has been no transfer and no transfer was declared or deemed as explained above.

Then what kind of tax is it? There can be but one answer. If it cannot be a tax upon the right to transmit property at death because there was no transfer of this particular property at death, or if it is not in the class of estates specifically included by Congress to prevent tax evasion, in which a transfer was declared or deemed to take place at death, if created subsequent to September 8, 1916, then the tax must be a tax upon property. But the Estate Tax Act of 1924 does not provide for the imposition of a tax on property. If, therefore, while claiming to act under this law, the respondent levies and collects such tax without authority of law, that is taking private property without due process of law, and is taking private property for public use without compensation.

2. What has just been stated shows that subdivisions (h) and (e) of Section 302, if construed retroactively, would take property without due process of law and take private property for public uses without compensation. It also shows that the tax levied upon and collected from the estate of M. A. Gwinn and the

present tax, because of the gifts *inter vivos* between decedent and her only son, J. H. Gwinn, is a direct tax.

We have demonstrated that the tax collected and the proposed tax is not a transfer, death or excise tax, because there was no transfer of property at death nor did possession and enjoyment of the property pass to the beneficiary at death in contemplation of law, then this tax must be a tax upon property. If it is a tax on property, then it is a direct tax and must be apportioned as the Constitution directs.

The Act of 1924, subdivisions (h) and (e) of Section 302, is applicable only to joint ownerships with right of survivorship, created subsequent to September 8, 1916, and the tax will be imposed at death upon the value of the interest of decedent in such joint ownerships.

CONCLUSION.

For the reasons set forth above, it is submitted that the judgment of the United States Circuit Court of Appeals for the Ninth Circuit was erroneous and should be reversed.

Dated, San Francisco, California,
October 1, 1932.

Respectfully submitted,
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(Appendix Follows.)

Appendix

Statute and Regulations Involved

STATUTE

The Revenue Act of 1924 (Act of June 2, 1924, c. 234, 43 Stat. 253, 304) in Title III (Estate Tax) provided in part:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * * * *
>
> (e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: *Provided,* That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than a fair consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further,* That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the en-

tirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractioual part to be determined by dividing the value of the property by the number of joint tenants;

* * * * * * *

(h) Subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act. (U. S. C., Title 26, Sec. 1094.)

REGULATIONS

Regulations 68, promulgated March 26, 1925, under the Revenue Act of 1924, provided in part:

ART. 22. *Property held jointly or as tenants by the entirety.*—The foregoing provisions of the statute extend to joint ownerships, wherein the right of survivorship exists, and specifically reaches property held jointly by the decedent and any other person or persons, or by the decedent and spouse as tenants by the entirety, or deposited with any person or institution carrying on a banking business in the name of the decedent and any other person and payable to either or the survivor, provided the decedent contributed towards the acquisition of the property so held or deposited, or acquired it by gift, bequest, devise, or inheritance. The statute applies to all classes of

property, whether real or personal, where the survivor takes the entire interest therein by right of survivorship, and no interest therein forms a part of the decedent's estate for purposes of administration. It does not include property held by the decedent and any other person or persons as tenants in common.

Regulations 68, issued under the Revenue Act of 1924 merely copied Section 302(h) of that Act, but did not construe it.

Treasury Decision 4248 (VII-2 Cumulative Bulletin 358-359), promulgated November 23, 1928, provides:

Treasury Department,
Office of Commissioner
of Internal Revenue,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

Article 22 of Regulations 68 and 70 is hereby amended by adding thereto the following sentence:

The statute applies only to joint ownerships based on the right of survivorship and created subsequent to September 8, 1916.

D. H. Blair,
Commissioner of Internal Revenue.

Approved November 23, 1928.
A. W. Mellon,
Secretary of the Treasury.

Treasury Decision (4294) (IX-2 Cumulative Bulletin 425), promulgated July 3, 1930, provides:

Treasury Department,
Office of Commissioner
of Internal Revenue,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

The last sentence of article 22 of Regulations 68, added thereto by Treasury Decision 4248, is amended to read as follows:

The statute extends to joint ownerships wherein the right of survivorship exists, regardless of when such joint ownerships were created.

Robt. H. Lucas,
Commissioner of Internal Revenue.

Approved July 3, 1930.
A. W. Mellon,
Secretary of the Treasury.

Section 220 of the New York State tax law (Consolidated Laws, ch. 60) was amended by chapter 554 of the laws of 1915 by the addition thereto of subdivision 7, which read as follows:

"Whenever intangible property is held in joint names of two or more persons, or as tenants by the entirety, or is deposited in banks or other institutions or depositaries in the joint names of two or more persons and payable to either or the survivor, upon the death of one of such persons the right of surviving tenant by

California 1917 statutes, page 882, Section 2, paragraph 5.

"Whenever property, real or personal, is held in the joint names of two or more persons, or is deposited in banks or other institutions or depositaries in the joint names of two or more persons and payable to either or the survivor, upon the death of one of such persons, the right of the surviving joint tenant or joint

the entirety, joint tenant or joint tenants, person or persons, to the immediate ownership or possession and enjoyment of such property shall be deemed a transfer taxable under the provision of this chapter in the same manner as though the whole property to which such transfer relates belonged absolutely to the deceased tenant by the entirety, joint tenant or joint depositor and had been bequeathed to the surviving tenant by the entirety, joint tenant or joint tenants, person or persons, by such deceased tenant by the entirety, joint tenant or joint depositor by will." New York 1915 statutes, page 2238.

New York 1916 statutes, page 866, same as above with exception of first line which reads:

"Whenever property is held in joint names to two • • •"

tenants, person or persons to immediate ownership or possession and enjoyment of such property shall be deemed a transfer taxable under the provision of this act in the same manner as though the whole property to which such transfer relates belonged absolutely to the deceased joint tenant or joint depositor and had been bequeathed to the surviving joint tenant or joint tenants, person or persons, by such deceased joint tenant or joint depositor by will, excepting therefrom such part thereof as may be proved by the surviving joint tenant or joint tenants to have originally belonged to him or them and never to have belonged to the decedent." Approved May 23, 1917. In effect July 27, 1917.